1-1-1993

Substantive Rights Accorded Refugees Interdicted on the High Seas: *Haitian Centers Council v. McNary*

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CASENOTE

SUBSTANTIVE RIGHTS ACCORDED REFUGEES INTERDICTED ON THE HIGH SEAS: *HAITIAN CENTERS COUNCIL v. McNARY*

I. INTRODUCTION

The number of people attempting to emigrate from Haiti to the United States has increased dramatically following the military coup which overthrew the Aristide government in Haiti on September 30, 1991.[1] Since the coup, about 40,000 people have attempted to leave.[2] Primarily, fear of persecution or economic hardship or both motivate the migrants.[3] The White House has responded with a high seas interdiction program. The United States Coast Guard began stopping, boarding, and repatriating the "boat people" to Haiti, pursuant to President Bush's Executive Order Number 12,087.[4] The interdiction occurs extraterritorially with no effort to ascertain whether the interdictees have a credible fear of persecution upon repatriation.[5] The former President based his authority for these actions on a bilateral Executive agreement signed with the Haitian government[6] in 1981 and on the broad powers given him by the Immigration and Nationality Act[7] (INA). Breaking a campaign vow, newly elected President Clinton continues this interdiction program.[8]

The Haitian Centers Council[9] (HCC) brought suit on behalf of the interdictees who would have qualified as refugees and those who might qualify as refugees in the future. The HCC claimed that the Coast Guard's actions at the direction of the President violate:

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1. Susan Beck, *Cast Away: How the INS Tried to Save the Haitians, and How Bush Administration Hard-lined Policies Prevailed*, AM. LAW., Oct. 1992, at 54.

2. Matthew C. Vita, *U.S. Sends Task Force to Stop Haitians Dangerous Exodus Feared as Inauguration Day Nears*, ATLANTA J. & CONST., Jan. 16, 1993, at A1.

3. Beck, *supra* note 1, at 54, 56.

4. Exec. Order No. 12,807, 3 C.F.R. 303 (1993).

5. Beck, *supra* note 1, at 56.

6. Agreement to Stop Clandestine Migration of Residents of Haiti to the United States, Sept. 23, 1981, U.S.-Haiti, T.I.A.S. No. 10,241, at 3559.

7. Immigration and Nationality Act, Pub. L. No. 82-414, §§ 212, 215, 66 Stat. 163, 182, 190 (1952) (codified as amended at 8 U.S.C. §§ 1182(f), 1185(a)(1) (1988)).

8. Joan Biskupic, *Administration to Defend Bush Haitian Policy in Court; After Assailing Interdiction Program as Illegal During Campaign, Clinton Has Adopted It*, WASH. POST, Mar. 1, 1993, at A9.

9. Haitian Ctrs. Council v. McNary, 969 F.2d 1350 (2d Cir.), *stay granted*, 113 S. Ct. 3, *and cert. granted*, 113 S. Ct. 52 (1992).

section 243(h) of the INA; article 33 of the Refugee Convention;[10] the 1981 U.S.-Haiti agreement; the Administrative Procedure Act;[11] and the Equal Protection Clause of the Fifth Amendment.[12] The Government countered that HCC's claims were without merit: because section 243(h) does not apply extraterritorially, no protection is available under the Protocol Relating to the Status of Refugees,[13] and the Eleventh Circuit's holding in *Haitian Refugee Center v. Baker* bars the action through collateral estoppel.[14] On appeal, the United States Court of Appeals for the Second Circuit *held*, reversed: the actions of the Coast Guard are in violation of section 243(h) of the INA. *Haitian Centers Council v. McNary*, 969 F.2d 1350 (2d Cir.), *stay granted*, 113 S. Ct. 3, *and cert. granted*, 113 S. Ct. 52 (1992).

Part II of this Note discusses the Second Circuit's decision. Part III examines the proper application of INA section 243(h) and article 33 of the Refugee Convention in light of *McNary*, focusing on the proper role of the judiciary. As an analysis of the Protocol will show, application of the political question doctrine and the issue of whether the treaty is self-executing both turn to a significant degree on judicial restraint and separation of powers.

This Note argues that in the absence of expressed congressional intent, the courts should not apply section 243(h) extraterritorially. The traditional presumption against application outside the United States, coupled with the prudence of judicial restraint, mandate this result. Part IV of this Note demonstrates that the plain language of article 33 prohibits the interdiction program. Moreover, article 33 is self-executing and does not intrude upon the power of Congress. Section 243(h) and article 33 can operate co-extensively because Congress did not attempt to limit article 33 with subsequent revisions to section 243(h). Part V reasons that the situation in this case does not present a nonjusticiable political question. Rather, it is the duty of the judiciary to interpret treaties when they are self-executing and thus, constitute law. Finally, the foreign affairs concerns are inconsequential because the present ac-

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10. Convention Relating to the Status of Refugees, July 28, 1951, art. 33, 189 U.N.T.S. 137, 176 [hereinafter Refugee Convention].

11. 5 U.S.C. §§ 551-706 (1988).

12. U.S. CONST. amend. V.

13. Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223 [hereinafter Protocol].

14. Haitian Refugee Ctr. v. Baker, 953 F.2d 1498 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 1245 (1992). The collateral estoppel issue is outside the scope of this Note.

tion does not broadly challenge foreign policy.

II. The Second Circuit's Decision

The *McNary* court held that the Eleventh Circuit's holding in *Baker* did not collaterally estop the plaintiffs' claims.[15] On the merits, the court held that the interdiction program returns aliens to Haiti in violation of the INA.[16] The court found support for this position in the plain language of section 243(h) of the INA which prohibits the return of any alien who is persecuted on the basis of, *inter alia*, political beliefs and whose life or freedom is threatened.[17] Because at least some of the Haitian interdictees meet the criteria under section 243(h) of political refugees whose lives are threatened, the interdictees should not be returned to Haiti without an interview to ascertain their status. As Aristide supporters, the returned refugees may face persecution by the de facto military regime.[18]

Although the interdiction occurs on the high seas, the court believed that the language of section 243(h), which prohibits the "return" of "any alien," clearly makes the provision applicable outside the United States.[19] The court reasoned that "return" applies regardless of where the alien is returned from.[20]

The court supported its interpretation of section 243(h) with the legislative history of the Refugee Act of 1980.[21] The Refugee Act revised section 243(h) and attempted to bring it into conformity with article 33 of the Refugee Convention.[22] The court reasoned that although article 33 was not self-executing, it could be used to ascertain Congressional intent because Congress based its revision

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15. 969 F.2d at 1354-57. The United States Court of Appeals for the Second Circuit distinguished the class of Haitians in *McNary* which included Haitians who had a credible fear of persecution, from the *Baker* class which did not. *Id.* Further, the *McNary* court found that the President's Executive Order was a significant intervening change which warranted a new determination of the interdictee's rights. *Id.* Finally, the court supported its refusal to find collateral estoppel by reasoning that a conflict in the circuits would encourage a Supreme Court determination of the important issues in this case. *Id.*

16. *Id.* at 1367.

17. *Id.*

18. *Id.*

19. *Id.* at 1358.

20. *Id.* at 1361.

21. *Id*; Refugee Act of 1980, Pub. L. No. 96-212, § 203(e), 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.).

22. 969 F.2d at 1361 (citing Supreme Court interpretations of legislative history); *see also infra* notes 66-67 and accompanying text.

of section 243(h) on article 33.[23] Article 33 provides that persecuted refugees shall not be returned, but does not specifically state where they shall not be returned from.[24] Finding the history of the Protocol ambiguous, the court relied on the plain language of article 33 to support its conclusion that any return is prohibited.[25]

The court relied heavily on the Refugee Act's removal of the words "within the United States" from section 243(h) to conclude that the revised statute was intended to apply outside the United States.[26] The removal of that phrase suggests that section 243(h) has broader application than its original meaning as an exception to deportation under the INA.[27]

The court found the traditional presumption against extraterritorial application inappropriate because the underlying purpose of the presumption is to avoid a conflict with the laws of other nations and the case presented no such conflict.[28] Furthermore, the court found that the Executive's interpretation of the statute—that it does not apply extraterritorially—was entitled to no deference because it resembled a "litigating posture," that shifted for the sake of convenience.[29]

In contrast, the United States Eleventh Circuit Court of Appeals in *Baker* held, *inter alia,* that section 243(h) does not apply outside the territory of United States.[30] The court found the fact that Congress kept section 243(h) in the deportation section of the INA to be dispositive, even though it had amended the act.[31] The Eleventh Circuit reasoned that deportation from the United States is not possible without being present in the country.[32]

III. Substantive Protection Accorded Political Refugees Under the INA: Extraterritorial Application of the Statute

A statute applies outside the territory of the United States

23. 969 F.2d at 1361.
24. *Id.*; *see also infra* text accompanying note 37.
25. 969 F.2d at 1366.
26. *Id.* at 1359.
27. *Id.* at 1360.
28. *Id.* at 1358.
29. *Id.* at 1364.
30. Haitian Refugee Ctr., Inc. v. Baker, 953 F.2d 1498, 1505 (11th Cir.), *cert. denied,* 112 S. Ct. 1245 (1992).
31. *Id.* at 1510.
32. *Id.*

only if Congress so intended.[33] Traditionally, when Congress is silent on the issue, a presumption arises against extraterritorial application.[34] Therefore, to ascertain whether section 243(h) applies outside the United States, the logical starting point is to use the traditional modes of statutory construction to look for expressed Congressional intent. If this search reveals no clear intent, then the presumption against extraterritorial application should apply.[35]

A. Textual Analysis

The INA provides for withholding the deportation of refugees in section 243(h). Prior to 1980, section 243(h) of the INA read:

> The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time he deems to be necessary for such reason.[36]

With the Refugee Act of 1980 Congress replaced this section. It now reads:

> The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.[37]

The central issue for this analysis is whether Congress intended for this revised statute to apply outside the United States. The plain language of section 243(h), the INA as a whole, the legislative history of the Refugee Act, judicial interpretations, and the adoption of the Protocol are all relevant to the inquiry.

The traditional method of statutory construction is to look first at the plain language of the statute.[38] If the plain language is clear, the inquiry is complete.[39]

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33. Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949); Blackmer v. United States, 284 U.S. 421 (1932).

34. 336 U.S. at 285.

35. *Id.*

36. Immigration and Nationality Act, Pub. L. No. 82-414, § 243(h), 66 Stat. 163, 212-14 (1952) (codified at 8 U.S.C. § 1253(h) (1980)).

37. Refugee Act of 1980, Pub. L. No. 96-212, § 203(e), 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.).

38. Connecticut Nat'l Bank v. Germain, 112 S. Ct. 1146, 1149 (1992).

39. *Id.* at 1149.

The *McNary* court reasoned that the removal of the words "within the United States" indicates a clear congressional intent to apply the statute outside the United States.[40] The *Baker* court, on the other hand, found that because section 243(h) was placed in part V of the INA,[41] Immigration-Deportation, the section is an exception to deportation, and thus, it relates only to deportation.[42] Since deportation necessarily requires an alien's presence in the country, the *Baker* court concluded section 243(h) does not apply extraterritorially.[43]

Traditionally courts have held that section 243(h) does not apply outside the borders of the United States.[44] Therefore, only if the Refugee Act of 1980 changed the obligations imposed by section 243(h) would the section now apply extraterritorially. Congress altered the language of section 243(h)(1) in three ways. It changed the discretionary language of "is authorized to withhold deportation" to the mandatory language of "shall not deport."[45] It expanded the definition of a refugee to include membership in a particular social group and nationality.[46] Finally, it changed the language "any alien within the United States" to "any alien."[47] The removal of the phrase "within the United States" seems dispositive of the inquiry into congressional intent on the issue of extraterritorial application. However, courts have never interpreted the phrase in accordance with its plain meaning.

When Congress passed the Refugee Act of 1980 the Supreme Court had previously interpreted the phrase "within the United States" not to mean physically present within the United States. In *Leng May Ma v. Barber*,[48] the Supreme Court interpreted "within the United States" to apply only to aliens who legally "entered" the country and therefore, were deportable.[49] There, an

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40. 969 F.2d at 1359.

41. *See infra* text accompanying notes 57-61 (at least in the original version, § 243(h) was an exception to deportation).

42. Haitian Refugee Ctr. v. Baker, 953 F.2d 1498, 1510 (11th Cir.), *cert. denied*, 112 S. Ct. 1245 (1992).

43. *Id.*

44. *See* Leng May Ma v. Barber, 357 U.S. 185, 189 (1953) (citing Justice Holmes in Kaplan v. Todd, 267 U.S. 228, 230 (1925) (finding that a similar immigration statute did not apply to persons who had not entered the country)).

45. See *supra* notes 36-37 and accompanying text.

46. See *supra* notes 36-37 and accompanying text.

47. See *supra* notes 36-37 and accompanying text.

48. 357 U.S. 185 (1953).

49. *Id.* at 188.

alien illegally entered the country, and the INS subsequently paroled her from detention pending exclusion[50] proceedings.[51] The Court refused to apply section 243(h) because she was not "within the United States" despite her physical presence.[52] The Court relied on long standing precedent when it stated that "an alien in custody pending determination of his admissibility does not legally constitute an entry though the alien is physically present within the United States."[53] The Court concluded that because section 243(h) was in part V (Deportation), invocation of its protection required an "entry."[54] Therefore, prior to the 1980 amendment, section 243(h) did not apply to excludable aliens, even those aliens physically within the territory of the United States who had not made a legal entry. The legislative history shows that when Congress removed the words "within the United States" it at least intended to include excludable aliens within the protection of section 243(h).[55] Arguably, Congress intended only to effect that change. It may have intended for the existing territorial application to remain in place.

While the forgoing analysis hardly proves that Congress did not intend section 243(h) to apply extraterritorially, it certainly undermines any reasoning that the plain language indicates clear congressional intent to apply section 243(h) outside the United States.

B. The INA as a Whole

To properly interpret a statute, a court must also look at the statute as a whole.[56] Subchapter II of the INA has the title "Immi-

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50. It is important to note the difference between excludable and deportable aliens. An excludable alien has not made an "entry" whereas a deportable alien has. An entry requires: physical presence, inspection and admission by an immigration official or evasion thereof, and freedom from restraint. *See* IRA J. KURZBAN, IMMIGRATION LAW SOURCEBOOK 22-24 (3d ed. 1992).

51. *Leng*, 357 U.S. at 186.

52. *Id.* at 190.

53. *Id.* at 188 (citing Shaughnessy v. United States *ex rel.* Mezi, 345 U.S. 206 (1953)).

54. *Id.* at 189.

55. *See* S. REP. No. 256, 96th Cong., 2d Sess. 17 (1980), *reprinted in* 1980 U.S.C.C.A.N. 141, 157 ("section 203(e) revises the provisions of section 243(h) of the Act . . . to require the Attorney General to withhold deportation of aliens who seek asylum in exclusion, as well as deportation, proceedings"); *see also* H.R. REP. No. 608, 96th Cong., 1st Sess. 30 (1979) (indicating similar intent).

56. *See* NORMAN SINGER, 2A SUTHERLAND'S STATUTES AND STATUTORY CONSTRUCTION § 46.05 (5th ed. 1992) [hereinafter SUTHERLAND'S STATUTORY CONSTRUCTION].

gration." The INA is a comprehensive statute, providing for virtually all aspects of Immigration. Part V of subchapter II, entitled "Deportation; Adjustment of Status," defines deportable aliens,[57] sets forth the means for their apprehension and deportation,[58] indicates the countries and conditions for deportation,[59] and provides for adjustment of status[60] and suspension of deportation.[61] Within part V is section 243, paragraph (h), entitled "Withholding of Deportation." An examination of the INA as a whole makes it clear that section 243(h) relates solely to deportation, which can only occur from within the territory of the United States. The court in *Baker* essentially followed this reasoning when it concluded that the placement of section 243(h) in part V was dispositive.[62]

The *McNary* court recognized that section 243(h) remained in part V of the INA after 1980.[63] However, the court reasoned that due to its "clear language" it now "has broader application than most other portions of Part V."[64] As discussed above, the plain language of the provision is anything but a clear indication of a congressional intent for extraterritorial application. Therefore, the *McNary* court's argument for broader application is at best inconclusive.

C. Legislative History

Although the framework of the INA provides little help in determining whether Congress intended to apply section 243(h) extraterritorially, the possibility remains that Congress did so intend. Where there is ambiguity in a statute, examining its legislative history is a valid means to assess the lawmakers' intent.[65]

The Supreme Court has recognized that Congress intended to conform the language of section 243(h) with article 33 of the Refu-

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57. 8 U.S.C. § 1253(h) (1988 & Supp. II 1990).

58. 8 U.S.C. § 1252 (1988 & Supp. II 1990).

59. 8 U.S.C. § 1253 (1988 & Supp. II 1990).

60. 8 U.S.C. §§ 1255-56 (1988 & Supp. II 1990).

61. 8 U.S.C. § 1254 (1988 & Supp. II 1990).

62. Haitian Refugee Ctr. v. Baker, 953 F.2d 1498, 1510 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 1245 (1992).

63. 969 F.2d at 1359.

64. *Id.* at 1360.

65. United States v. Donruss Co. 393 U.S. 297, 301, *reh'g denied*, 393 U.S. 1112 (1969); 2A SUTHERLAND'S STATUTORY CONSTRUCTION, *supra* note 56, § 48.01.

gee Convention.[66] A careful reading of the legislative record indicates that Congress was conforming only to the language of article 33 which defines aliens who must not be deported or excluded under the Protocol, and not to the geographic application. The House Judiciary Committee report confirms this:

> [T]he Committee feels it is desirable, for the sake of clarity, to conform the language of [section 243(h)] to the Convention [article 33]. This legislation does so by prohibiting . . . deportation . . . [if] the alien's life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion.[67]

Thus, Congress intended to define an alien under section 243(h) in conformity with article 33.

A thorough reading of the Congressional reports reveals that nowhere did Congress consider the application of section 243(h) outside the territory of the United States.[68] Plain logic supports the conclusion that Congress did not consider territorial application. The current interdiction program is almost unthinkable. It seems obvious that the members of Congress did not anticipate the "cruel hoax"[69] that was to be perpetrated by the Executive.

What did Congress intend? The plain language is ambiguous, reading the statute as a whole is inconclusive, and the legislative history contains no clear mandate. Thus, the standard modes of statutory construction are conclusively inconclusive. These indices point to the conclusion that Congress simply did not consider extraterritorial application when it drafted section 243(h) to conform to the Protocol. The fact that section 243(h) did not apply extraterritorially before 1980 coupled with its continued placement in part V of the INA weighs heavily against extraterritorial application. However, we must further examine the application of statutes outside the United States, because Congress did, in some way, intend to codify article 33 of the Refugee Convention, which does

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66. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 436, 440 (1987); INS v. Stevic, 467 U.S. 407, 421 (1984).

67. H.R. REP. No. 608, 96th Cong., 1st Sess. 18 (1979); *see also* H.R. CONF. REP. 781, 96th Cong., 2d Sess. 20 (1980) (indicating that § 243(h) "is based directly upon the language of the Protocol").

68. *See* H.R. CONF. REP. No. 781, 96th Cong., 2d Sess. (1980); S. CONF. REP. No. 590, 96th Cong., 2d Sess. (1980); H.R. REP. No. 608, 96th Cong., 1st Sess. (1979); S. REP. No. 256, 96th Cong. 1st Sess. (1979).

69. *McNary*, 969 F.2d at 1353 (quoting the trial judge's assessment of the interdiction program).

apply extraterritorially, into section 243(h).[70]

D. The Presumption Against Extraterritorial Application

Traditionally, courts have been reluctant to apply statutes outside the United States, particularly absent express Congressional intent to do so.[71] In *Foley Bros. v. Filardo*[72] the Court held that the Eight Hour Law, which guaranteed workers one and a half times the basic wage for overtime,[73] did not apply to individuals in Iran and Iraq who worked for U.S. contractors. The Court explained:

> The canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States, is a valid approach whereby unexpressed congressional intent may be ascertained. It is based on the assumption that Congress is primarily concerned with domestic conditions.[74]

The *McNary* court cited *EEOC v. Arabian American Oil Co.*[75] to undercut the presumption against extraterritorial application.[76] Noting that the presumption "serves to protect against unintended clashes between our laws and those of other nations that could result in international discord,"[77] the court with almost no discussion found the presumption of no relevance.[78] The court found no clash with the laws of another sovereign nation,[79] and it went on to conclude that the language "any alien" indicated congressional intent of extraterritorial application.[80]

The *McNary* court's analysis of the presumption against extraterritorial application is incomplete. The mere fact that a domestic law presents no conflict with the laws of other nations does not mean the presumption should not apply. *EEOC v. Arabian*

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70. For a discussion of the applicability of article 33, see *infra* part IV.A.

71. *See* Blackmer v. United States, 284 U.S. 421, 437 (1932); Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949).

72. 336 U.S. 281 (1949).

73. *See id.* at 283.

74. 336 U.S. at 285 (citations omitted).

75. 111 S. Ct. 1227 (1991).

76. 969 F.2d at 1358.

77. *Id.* (quoting EEOC v. Arabian Am. Oil Co., 111 S. Ct. at 1227, 1230 (1991)).

78. *Id.*

79. *Id.*

80. This language, however, is anything but clear. *See supra* part III.A-B.

American Oil Company,[81] in fact, supports this conclusion. In considering the extraterritorial application of a statute in *Arabian American Oil*, the Supreme Court first concluded that although the plaintiff had presented some evidence that the statute applied extraterritorially,[82] it was insufficiently probative to show the required "affirmative congressional intent."[83] The Court clearly placed the burden upon the proponent of extraterritorial application:

> We need not choose between these competing interpretations [of Title VII of the Civil Rights Act of 1964[84]] as we would be required to do in the absence of the presumption against extraterritorial application . . . . Each is plausible, but no more persuasive than that. The language relied upon by petitioners—*and it is they who must make the affirmative showing*—is ambiguous and does not speak directly to the question presented here.[85]

The Court in *Arabian American Oil* went on to recognize that Congress legislates against a backdrop of nonextraterritorial application.[86] The Court cited numerous instances where Congress has made a clear statement of application outside the United States, indicating that when Congress wants to make a statute apply extraterritorially, it knows how to do so.[87]

Another case that illustrates the Supreme Court's view on extraterritorial application is *Argentine Republic v. Amerada Hess Shipping Corporation*[88] In *Amerada Hess*, the Court considered the extraterritorial application of the Foreign Sovereign Immunities Act of 1976 (FSIA).[89] The FSIA defines "United States" for purposes of applicability as including "all territory and waters, continental and insular, subject to the jurisdiction of the United States."[90] At issue in the case was whether the FSIA applied to

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81. 111 S. Ct. 1227 (1991).
82. *Id.* at 1231.
83. *Id.*
84. Civil Rights Act of 1964, 42 U.S.C. § 2000a-2000h-6 (1988).
85. 111 S. Ct. at 1231.
86. *Id.* at 1230.
87. *Id.* at 1235-36 (citing, *inter alia*, Coast Guard Act, 14 U.S.C. § 89(a) (1988) (allowing the Coast Guard to preform searches and seizures upon the high seas); 18 U.S.C. § 7 (1988) (extending criminal code to high seas); 19 U.S.C. § 1701 (1988) (allowing customs enforcement on the high seas); Logan Act, 18 U.S.C. § 953 (1988) (applying the Act to "[a]ny citizen . . . wherever he may be")).
88. 488 U.S. 428 (1989).
89. 28 U.S.C. § 1603(c) (1988).
90. *Id.*

accidents occurring on the high seas.[91] Although the high seas are within the admiralty jurisdiction of the United States,[92] the Court refused to construe the term "waters"—for purposes of the FSIA—as all waters over which U.S. courts might exercise jurisdiction.[93] For the majority, Congress simply did not make a "clear statement" that the FSIA was to apply outside the United States: "When it desires to do so, Congress knows how to place the high seas within the reach of a statute."[94] Applying this logic to section 243(h) of the INA, the removal of the words "within the United States" would seem insufficient to counter the presumption against extraterritorial application.

It may be tempting to argue for an exception to the presumption: where no conflict of law is present and the statute by its nature relates to aliens—people who come from outside the United States—the statute should apply extraterritorially. Even though there is no conflict of laws, it would be prudent to adhere to the presumption against extraterritorial application. The underpinnings of the doctrine go beyond avoiding conflicts with the laws of other nations. The Supreme Court has recognized that Congress legislates against a backdrop of nonextraterritorial application.[95] Therefore, Congress must make clear its intent to apply legislation outside the United States.[96]

Here the competing interests of certainty in interpretation and certainty in the context of lawmaking conflict with the need to save or help the interdictees. The presumption is sensible because it allows for stability in lawmaking and interpretation. The basic purpose of the judiciary is to interpret and apply the laws, not to make them.[97] Therefore, to erode a doctrine which fosters stability in that function is unsound.[98] In any event, the application of sec-

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91. The high seas are those waters "beyond the territorial jurisdiction of any country." BLACK'S LAW DICTIONARY 728 (6th ed. 1990).

92. *See* The Plymouth, 70 U.S. (3 Wall) 20 (1866).

93. 488 U.S. at 440.

94. *Id.*; see also *supra* note 87 for examples. Note that the Court continues to require that Congress make a clear statement of extraterritorial application. Smith v. United States, 113 S. Ct. 1178, 1183 (1993).

95. *Arabian*, 111 S. Ct. at 1232.

96. *Id.*

97. In accordance with our system of separation of powers and representative government, elected officials make the laws and courts interpret them. *See* 2A SUTHERLAND'S STATUTORY CONSTRUCTION, supra note 56, § 45.01, 45.03; *see generally* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

98. "Accepted rules of statutory construction can provide helpful guidance in uncover-

tion 243(h) is not needed to protect the interdictees, because article 33 of the Refugee Convention provides ample protection.[99]

E. Conclusion of Section 243(h) Analysis

As discussed above, the legislative history suggests that Congress simply did not consider the extraterritorial application of section 243(h) even though Congress could have applied section 243(h) outside the United States. Generally, where no intent is ascertainable, courts presume that the statute does not apply outside the United States because Congress legislates against a backdrop of nonextraterritorial application and the presumption avoids potential conflicts with laws of other nations. Here, the presumption dictates that the INA does not apply to aliens who are interdicted outside the United States.[100]

IV. SUBSTANTIVE PROTECTION ACCORDED POLITICAL REFUGEES UNDER THE PROTOCOL

Although the plaintiffs do not have rights under the INA, they do have protection under the language of article 33 of the 1951 United Nations Convention Relating to the Status of Refugees.[101] The 1967 Protocol Relating to the Status of Refugees[102] incorpo-

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ing the most likely intent of the legislature." 2A SUTHERLAND'S STATUTORY CONSTRUCTION, *supra* note 56, § 45.02. It follows that variance from those rules would necessarily confuse the discovery of legislative intent.

99. *See infra* part IV.

100. The President's Executive Order No. 12,807 relies on § 212(f) and § 215(a)(1) of the INA for authority to suspend the entry of aliens. 57 Fed. Reg. 23,133 (1992). Section 215(a) allows the President to suspend "entry" during war or a national emergency proclaimed by the President. 8 U.S.C. 1182(f). In this case, these conditions are not fulfilled. Section 212(f) is broader and grants the President the power to "suspend the entry of all aliens [which would be detrimental to the interests of the United States] as he may deem to be appropriate." 8 U.S.C. § 1185(a)(1).

Neither § 212(f) nor § 215(a)(1) provide authority for the interdiction program. The INA does not generally apply extraterritorially. The Executive's contention that § 243(h) does not apply outside the United States while the similar § 212(f) and § 215(a)(1) do, is inconsistent. Furthermore, "entry" requires the crossing of a boarder, *see* KURZBAN, *supra* note 50 at 22, which the interdictees have not done.

101. Refugee Convention, *supra* note 10 at 176.

The *McNary* court acknowledged the district court's finding that specific plaintiffs who had been returned were subsequently abused and tortured in the wake of "heightened political repression." 969 F.2d at 1353. Thus, as a matter of fact, the interdictees are the type of refugees that article 33 was designed to protect.

102. Protocol, *supra* note 13.

rates the 1951 Refugee Convention.[103] Though the United States was not a party to the 1951 Refugee Convention, it did accede to the Protocol in 1967.[104] Therefore, the United States has agreed to be bound by the provisions of the 1951 Refugee Convention as well as the provisions of the Protocol.

A number of questions arise in conjunction with the Protocol's application. First, does the Protocol apply extraterritorially to the Haitian interdictees? Second, is article 33 of the Treaty self-executing and able to operate coextensively with the INA? Third, what level of deference should a court give to the President's interpretation of the Treaty?

A. Applicability

1. Ascertaining Intent

Article 33 of the Refugee Convention does protect the Haitian Interdictees. In *McNary* the majority and the dissent examined the legislative history of the 1951 Refugee Convention to ascertain whether article 33 was intended to apply extraterritorially.[105] Looking to the legislative history, however, misses the mark because the plain language of the Protocol is clear in this regard. Article I(3) of the Protocol provides that "[t]he present Protocol shall be applied by the States Parties hereto without any geographic limitation."[106]

A treaty is a contract, of sorts, between nations.[107] In construing these contracts, courts seek to enforce the intent of the parties.[108] Courts must consider the relevant sources to determine that intent. It is generally accepted that the analysis of a treaty must begin with the text.[109] The applicability of "extra-textual" materials is less clear, particularly when the text indicates clear intent.[110] In the case of article 33 the relevant sources are: the language of article 33 from the 1951 Refugee Convention—adopted by the Pro-

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103. *See supra* note 115 and accompanying text.

104. The United States acceded to the Protocol on October 15, 1968. It became binding on November 1, 1968. *See* Protocol, *supra* note 13, 19 U.S.T. at 6257.

105. 969 F.2d at 1365-66, 1377-79.

106. Protocol, *supra* note 13, art. I, para. 3, 19 U.S.T. at 6225.

107. Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829).

108. The Amiable Isabella, 10 U.S. (6 Wheat.) 1, 72 (1821).

109. Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 180 (1982).

110. United States v. Stuart, 489 U.S. 353, 372 (1989) (Scalia, J., concurring).

tocol; the language of the Protocol itself; the negotiation history of the 1951 convention; and the ratification and negotiation history of the Protocol.[111]

The text of article 33 is the central provision on which the interdictees base their claim. Article 33(1) reads:

> No Contracting state shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of particular social group or political opinion.[112]

The *McNary* court dedicated considerable effort to discussing "return" and concluded that return means just that. The language prohibits return, regardless of where the refugee is returned from.[113] The court also attempted to interpret the French word "refouler" and concluded that the language was ambiguous.[114] Concededly, there is no explicit language within article 33 to indicate extraterritorial application, but there is no specific language to prohibit it either.

Reading article I of the Protocol clarifies any ambiguity in the language of article 33 of the Refugee Convention. Article I of the Protocol incorporates articles 2 through 34 of the Refugee Convention.[115] Article I of the Protocol, entitled "General Provisions," provides in unambiguous language that "[t]he present Protocol shall be applied by the States Parties hereto *without any geographic limitation* . . . ."[116] The fact that the treaty does limit geographic application in some provisions supports the application of article I to article 33. For example, article 32 provides: "The contracting states shall not expel a refugee *lawfully in their territory*

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111. *See* The Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 32, 1155 U.N.T.S. 331, 340 (entered into force Jan. 27, 1980) (setting forth supplemental means of interpretation).

112. Refugee Convention, *supra* note 10, art. 33, para. 1, 189 U.N.T.S. at 176 (incorporated in the Protocol, *supra* note 13, art. 1, para. 1, 19 U.S.T. at 6225).

113. Haitian Ctrs. Council v. McNary, 959 F.2d 1350, 1362 (2d Cir.), *stay granted*, 113 S. Ct. 3, *and cert. granted*, 113 S. Ct. 52 (1992).

114. *Id.* at 1363. The Government cited CASSELL'S FRENCH DICTIONARY 627 (1978) to argue "refouler" means to "expel" from within. Brief for Appellees at 40, *McNary* (No. 92-6114). The interdictees relied on the DICTIONAIRE LAROUSSE, which indicates "refouler" "implies repelling or driving back." Brief for the Haitian Centers Council at 17, *McNary* (No. 92-6114).

115. Protocol, *supra* note 13, art. 1, para. 1, 19 U.S.T. at 6225 ("The States Parties to the present Protocol undertake to apply articles 2 to 34 [of the Refugee Convention].").

116. *Id.* art. 1, para. 3, 19 U.S.T. at 6225 (emphasis added).

. . . ."[117] This type of limitation is not used in article 33. Therefore, the general provision in article I suggests that article 33 applies "without any geographic limitation,"[118] and hence, article 33 applies to the Haitian refugees outside the territory of the United States.

If not for the record of the 1951 Refugee Convention the inquiry would certainly end here. The negotiating history of the Convention persuasively indicates that at least one delegate read article 33 to apply only within the territory of the contracting state.[119]

The court's "traditional rule of treaty construction is that an agreement's language is the best evidence of [the] parties' intent."[120] The language of the Protocol indicates an intent to apply article 33 without geographic limitation. However, the comments of the delegate from the Netherlands indicate an intent contrary to

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117. Refugee Convention, *supra* note 10, art 32, 189 U.N.T.S. at 174; *see also id.* arts. 4, 15, 18, 23, 24.1, 27, 28 (emphasis added).

118. The Government contended that article 7.4 of the Protocol, which incorporates article 40 of the Refugee Convention, contradicts this argument because article 40 provides that each state will declare the territorial application of the Protocol. Brief for Appellees at 42, *McNary* (No. 92-6114). This contention is erroneous and based on a misreading of the provision. Article 40 simply allows contracting parties to apply the Protocol to other territories within their control. The fact that some provisions of the Refugee Convention apply only within the territory of the contracting state supports this reading. See *supra* note 117 and accompanying text.

119. On July 25, 1951 the second and final reading of the draft Convention discussed article 33 as follows:

> Baron van BOETZELAER (Netherlands) recalled that at the first reading [U.N.Doc. A/CONF.2/SR.16, at 6 (July 11, 1951)] the Swiss representative had expressed the opinion that the word "expulsion" related to a refugee already admitted into a country, whereas the word "return" ("*refoulment*") related to a refugee already within the territory but not yet resident there. According to that interpretation, Article 28 would not have involved any obligations in the possible case of mass migrations across frontiers or of attempted mass migrations.
>
> He wished to revert to that point, because the Netherlands Government attached very great importance to the scope of the provision now contained in Article 33. The Netherlands could not accept any legal obligations in respect of large groups of refugees seeking access to its territory.
>
> . . .
>
> In order to dispel any possible ambiguity and to reassure his Government, he wished to have it placed on record that the Conference was in agreement with the interpretation that the possibility of mass migrations across frontiers or of attempted mass migrations was not covered by Article 33. There being no objection, the PRESIDENT [of the Conference of Plenipotentiaries] ruled that the interpretation given by the Netherlands representative should be placed on record.

Summary of the 35th Meeting, Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, U.N.Doc. A/CONF.2/SR.35, at 21 (1951).

120. United States v. Stuart, 489 U.S. 353, 372 (1989) (Scalia, J., concurring).

the textual interpretation. Therefore, the question becomes, are the comments relevant? This "extra-textual" material is not relevant for two reasons.

First, the Netherlands delegate made the reservation during the 1951 Refugee Convention. Because the United States was not a party to those negotiations,[121] it is illogical to attempt to ascertain the intent of the United States from the comments. If "extra-textual" materials were probative, the relevant materials would be those of the 1967 Protocol, not the 1951 Refugee Convention.

Second, where the language of the treaty is clear, it is arguably inappropriate to inquire into the negotiating history to ascertain intent.[122] The proper role of "extra-textual" materials in ascertaining intent has recently come under scrutiny. In *Sumitomo Shoji America, Inc. v. Avagliano*,[123] the Supreme Court stated: "The clear import of treaty language controls unless 'application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.' "[124] This statement perhaps goes too far and proves too much. As Justice Scalia explained in his concurrence in *Stuart*, "Only when a treaty provision is ambiguous have we found it to give effect to 'extra-textual' materials."[125] The Vienna Convention on the Law of Treaties[126] supports this position: article 32 provides for the use of "supplementary means of interpretation" only when the ordinary meaning of the words used "(a) [l]eaves the meaning ambiguous or obscure; or (b) [l]eads to a result which is manifestly absurd or unreasonable."[127] Here, there is no reason to go beyond the "clear import of a solemn treaty" because application of the plain meaning is neither ambiguous nor does it lead to absurd re-

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121. *See supra* note 104 and accompanying text.

122. *Id.*

123. 457 U.S. 176 (1982).

124. *Id.* at 181 (citing Maximov v. United States, 373 U.S. 49, 54 (1963)).

125. 489 U.S. at 371. Justice Scalia questioned the prudence of extra-textual inquiry when he stated:

> Of course, no one can be opposed to giving effect to "the intent of the Treaty parties." The critical question, however, is whether that is more reliably and predictably achieved by a rule of construction which credits, when it is clear, the contracting sovereigns' carefully framed and solemnly ratified expression of those intentions and expectations, or rather one which sets judges in various jurisdictions at large to ignore that clear expression and discern a "genuine" contrary intent elsewhere. To ask that question is to answer it.

Id.

126. Vienna Convention, *supra* note 111, art. 32, 1155 U.N.T.S. at 340.

127. *Id.*

sults.[128] In *Sumitomo*, a corporation that was incorporated in the United States but owned in Japan sought exemption from Title VII[129] obligations under a U.S.-Japanese Friendship Treaty.[130] The Court, however, refused to grant the exemption.[131] Although the language of the treaty did not distinguish by place of incorporation, the Court reasoned that to exempt the corporation would undermine the purpose of the treaty.[132] The Court supported its conclusion with the negotiating history of the Treaty.[133] Thus, the application of the *Sumitomo* exception would be inappropriate in this case because applying article 33 without geographic limitation in no way undermines it or the Protocol as a whole.

2. Deference to the Executive's Interpretation of the Treaty

In determining the proper interpretation of a statute, a court may consider deferring to the President's interpretation.[134] The *McNary* court, however, found that in this situation the interpretation in Executive Order 12,807 was entitled to no weight.[135]

Although not conclusive, the meaning attributed to treaty provisions by the government agencies charged with their negotiation and enforcement is entitled to great weight.[136] "[A]bsent strong contrary evidence," court usually defer to the Executive's interpretation.[137] Here, strong evidence suggests that article 33 applies outside the United States.[138] Therefore, given this "strong contrary evidence," the President's interpretation is entitled to no deference.

The court found support for this conclusion in the fact that the Executive had shifted its position for the sake of convenience. The *McNary* court found that in response to *Haitian Refugee*

128. United States v. Stuart, 489 U.S. 353, 372 (1989) (Scalia, J., concurring).

129. Civil Rights Act of 1964, 42 U.S.C. § 2000a-2000h-6 (1988).

130. Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176 (1982).

131. *Id.*

132. *Id.* at 186.

133. *Id.* at 182.

134. *See* Exec. Order No. 12,087, 57 Fed. Reg. 23,133 (1992) (declaring that "obligations" under article 33 of the Refugee Convention do not apply outside the United States). It is interesting to note that this statement implicitly indicates that article 33 is self-executing. *See infra* part IV.B.

135. 969 F.2d at 1364.

136. Kolovrat v. Oregon, 366 U.S. 187, 194 (1961).

137. Sumitomo Shoji Am., Inc. v. Avagilano, 457 U.S. 176, 185 (1982).

138. *See supra* part IV.A.1.

Center v. Baker,[139] the Legal advisor of the Department of State wrote to Acting Assistant Attorney General Flanigan on December 11, 1991, requesting that the Attorney General withdraw an opinion of the Office of Legal Counsel of August 11, 1981.[140] The 1981 opinion was contrary to the Department of State's interpretation regarding the nonextraterritorial application of article 33.[141] Therefore, for over ten years, at least one branch of the Executive interpreted article 33 to apply extraterritorially. As the *McNary* court noted, this sort of post hoc, second interpretation was entitled to no deference, especially given the plain language of the Protocol.[142]

B. Self-Execution

Since section 243(h) does not apply to the Haitian interdictees returned under the interdiction program, any protection they might have must come from article 33 of the Refugee Convention. To create rights for the interdictees the treaty must be self-executing.

Article VI, the Supremacy Clause, provides: "[A]ll Treaties made . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . ."[143] Notwithstanding this provision, the Supreme Court has traditionally held that treaties act as domestic law only when they are given effect by congressional legislation or are, by their nature, self-executing.[144]

It is important to note that one provision of a treaty may be self-executing while another is not.[145] Thus, it is not necessary to demonstrate that the entire Protocol is self-executing. For purposes of this analysis, only article 33 must be self-executing. Cases holding that other articles of the Protocol are not self-executing are not dispositive of the issue.[146]

If a treaty expressly provides for its implementation through legislation then it is not self-executing.[147] Typically, however, as in the case of the Protocol, a treaty is silent in this regard. Generally,

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139. 953 F.2d 1498 (11th Cir. 1991).
140. 969 F.2d at 1364.
141. *Id.*
142. *Id.*; *see also* Lewis v. Grinker, 965 F.2d 1206, 1220 (2d Cir. 1992).
143. U.S. CONST. art. VI, cl. 2.
144. Whitney v. Robertson, 124 U.S. 190, 194 (1888).
145. RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS § 111 cmt. h (1987).
146. *See infra* notes 165-75 and accompanying text.
147. RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS § 111 (1987).

absent an explicit provision within a treaty, the intent of the President and Senate, at the time of ratification, is the central issue in determining whether the treaty is self-executing.[148] There are also constitutional constraints upon the self-executing nature of an international agreement.[149] Such restraints basically invoke the doctrine of separation of powers to avoid enforcing a treaty when it attempts to accomplish what lies exclusively within the law-making authority of Congress.[150] For example, for a treaty to appropriate funds or to commit the country to war would be an impermissible intrusion into Congress's powers.[151]

In the case of article 33, the United States expressed an intent at the time of accession to be bound without further legislation. When considering accession to the Protocol, Congress recognized that when "the United States accedes to the protocol, it is automatically bound to apply articles 2 through 34 of the [Refugee Convention]. One of the basic provisions of that convention [is] (article 33)."[152] Furthermore, as the Secretary of State explained, "article [33] is comparable to Section 243(h) of the Immigration and Nationality Act . . . and *it can be implemented within the administrative discretion provided by existing regulations*."[153] Congress intended to create a binding obligation. The Attorney General would comply with this binding obligation through the discretion granted by the INA.

The separation of powers question presents a more difficult obstacle. Because Congress enacted the Refugee Act of 1980 to implement the Protocol, it can be argued that article 33 is not enforceable without legislation to implement it.[154] Therefore, any rights that may be available must flow from the Refugee Act.[155] The foundation for this argument is that Congress would not have felt compelled to legislate in an area if the Treaty was sufficiently binding. This argument is weak in several respects.

First, the intent at issue is that at the time of making.[156] Here,

148. Cook v. United States, 288 U.S. 102, 119 (1933); RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS § 111 cmt. h (1987).

149. RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS § 111 cmt. i. (1987).

150. *Id.*

151. *Id.*

152. S. EXEC. REP. No. 14, 90th Cong., 2d Sess. 1 (1968).

153. S. EXEC. Doc. K, 90th Cong., 2d Sess. at viii (1968) (emphasis added).

154. Brief for Appellees at 36, *McNary* (No. 92-6114).

155. *See* Bertrand v. Sava, 684 F.2d 204, 218-19 (2d Cir. 1982).

156. Cook v. United States, 288 U.S. 102, 119 (1933).

the subsequent legislation simply attempted to bring the INA into conformance with existing obligations.[157] Congress expressed its dispositive intent that the Attorney General would reconcile any differences between section 243(h) and article 33 without the need for implementing legislation.[158] Second, Congress simply did not consider the territorial application of section 243(h) when it passed the Refugee Act.[159] Therefore, it would be illogical in this circumstance to reduce existing protection under article 33. Simply because Congress made a less than comprehensive effort codifying article 33 does not mean that existing rights under the Protocol should be reduced. Finally, the fact that the Attorney General from 1967 to 1980 interpreted article 33 to apply extraterritorially demonstrates that no implementing legislation was necessary.[160]

The caselaw in the area is consistent with the foregoing analysis. Two recent Supreme Court decisions directly support the self-executing character of article 33. In *INS v. Cardoza-Fonseca*,[161] the Court recognized the binding character and thus, the self-executing nature of article 33. The Court stated:

> Prior to 1968, the Attorney General had discretion . . . under § 243(h). In 1968, however, the United States agreed to comply [with the Convention through the Protocol]. Article 33.1 of the Convention . . . imposed a *mandatory duty* on contracting states not to return [refugees meeting its requirements].[162]

In addition, *INS v. Stevic*, the predecessor to *Cardoza-Fonseca*, supports the self-executing nature of article 33.[163] The *Stevic* court stated that "to the extent that domestic law was more generous than the Protocol, the Attorney General would not alter existing practice; to the extent that *the Protocol* was more generous than the bare text of section 243(h) *would necessarily require*, the Attorney General would honor the requirements of the Proto-

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157. *See supra* notes 66-67 and accompanying text.

158. *See infra* notes 163-64 and accompanying text.

159. *See supra* notes 68-70 and accompanying text.

160. In Cook v. United States, 288 U.S. 102, 119 (1933), the Court considered conflicts between the 1924 Treaty Relating to the Smuggling of Intoxicating Liquors and the 1922 Tariff Act. It held the treaty to be self-executing: "[f]or in a strict sense the Treaty was self-executing in that no legislation was necessary to authorize executive action pursuant to its provisions." *Id.* at 118. Therefore, if the Attorney General can act to implement the legislation, as is the case here, it follows that the doctrine of separation of powers is not violated.

161. 480 U.S. 421 (1987).

162. *Id.* at 429 (emphasis added).

163. INS v. Stevic, 467 U.S. 407, 429 n.22 (1984).

col."[164] Thus, the Court recognized that the Protocol imposed a mandatory, and therefore self-executing, duty on the United States.

The *McNary* court did not consider the application of article 33 because it believed it was bound by its prior holding in *Bertrand v. Sava*.[165] That case involved a challenge to a District Director's discretionary decision not to parole a group of Haitian detainees.[166] The principal provision invoked in the action was article 31, not article 33.[167] The *Bertrand* court relied primarily on *Chim Ming v. Marks*[168] to conclude that the Protocol, generally, was not self-executing.[169] The *Chim* holding, however, would seem to suggest that at least some provisions of the Protocol are self-executing. In *Chim* the court denied relief under article 32 but specifically stated that its interpretation "by no means makes the [Protocol] a nullity and without benefit to refugees" and that "[t]here is protection . . . [u]nder Paragraph 1 of Article 33."[170] Therefore, the *McNary* court misplaced its reliance on *Bertrand* to conclude that article 33 is not self-executing. Additionally, the subsequent Supreme Court cases *Stevic* and *Cardoza-Fonseca* completely undercut any force that *Bertrand* may have had on this issue.[171] The remaining cases *Pierre v. United States*[172] and *United States v. Aguilar*,[173] which seem to contradict the self-executing character of article 33, are based on similarly flawed analysis.[174] They are not dispositive.

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164. *Id.* (emphasis added).

165. 684 F.2d 204 (2d Cir. 1985).

166. *Id.*

167. Article 31 relates to "Refugees unlawfully in the country of refuge." It states: "The contracting States shall not apply to the movements of such refugees restrictions . . . ." Refugee Convention, *supra* note 10, art. 31, 189 U.N.T.S. at 174 (incorporated into the Protocol, *supra* note 13, art. 1, para. 1, 19 U.S.T. 6225).

168. 505 F.2d 1170 (2d Cir. 1974), *cert. denied*, 421 U.S. 911 (1975).

169. Bertrand v Sava, 684 F.2d 204, 218 (2d Cir. 1982).

170. 505 F.2d at 1172.

171. Other cases that cite *Bertrand* without analysis are not persuasive in determining whether article 33 is self-executing. *See* Haitian Refugee Ctr. v. Baker, 949 F.2d 1109, 1110 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 1245 (1992); Haitian Refugee Ctr. v. Gracey; 600 F. Supp. 1396, 1401, 1406 (D.D.C. 1985), *aff'd on other grounds*, 809 F.2d 794 (D.C. Cir. 1987).

172. 547 F.2d 1281 (5th Cir. 1977), *vacated on other grounds*, 434 U.S. 962 (1977).

173. 883 F.2d 662 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 751 (1991).

174. *Pierre*, which preceded *Bertrand*, engaged in the same erroneous analysis. 547 F.2d at 1288. The court in *Aguilar* relied on *Stevic*, without much analysis, to conclude the Protocol is not self-executing. 883 F.2d at 680. The *Aguilar* court incorrectly cited footnote 22 of *Stevic* which supports a contrary conclusion. 883 F.2d at 680. The *Stevic* Court merely recognized that article 34 was not self-executing. 467 U.S. at 428 n.22. The *Stevic* Court

The *McNary* court was required to follow *Bertrand*.[175] However, the court did not need to overrule *Bertrand* to reach the conclusion that article 33 is self-executing because, while some parts of the Protocol may not be self-executing, article 33 is. *Bertrand* does not contradict this position.

C. Coextensiveness with Domestic Legislation

The foregoing analysis demonstrates that article 33 of the Refugee Convention is self-executing and that it does apply extraterritorially. However, it is necessary to consider whether article 33 can operate domestically, especially since Congress has legislated extensively in the area. Section 243(h) was in place prior to accession to the Protocol in 1967. Subsequently, the Refugees Act of 1980 amended section 243(h).

There is no doubt that Congress can abrogate a treaty by the subsequent enactment of a statute.[176] However, when possible, both are to be given effect.[177] "Only where a treaty is irreconcilable with a later enacted statute and Congress has clearly evinced an intent to supersede a treaty by enacting a statute does the later enacted statute take precedence."[178]

The *Restatement (Third) of the Law of Foreign Relations* confirms this long standing rule:

> Inconsistency Between International Law or Agreement and Domestic Law: Law of the United States.
> (1)(a) An Act of Congress supersedes an earlier rule of international law or a provision of an international agreement as law of the United States *if the purpose of the act to supersede the*

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then engaged in the analysis of article 33 which indicates it is self-executing. *Id.*; *see supra* text accompanying notes 163-164.

175. A panel of the Second Circuit Court of Appeals cannot overrule a prior holding; to do so, the court must meet en banc. *See* United States v. Curcio, 712 F.2d 1532, 1542 (2d Cir. 1983).

176. Whitney v Robertson, 124 U.S. 190, 193-95 (1888).

177. *E.g.*, Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 252 (1984), *reh'g denied*, 467 U.S. 1231 (1984); Weinberger v. Rossi, 456 U.S. 25, 32, (1982); Chew Heong v. United States, 112 U.S. 536, 550 (1884).

178. United States v Palestine Liberation Org. 695 F. Supp. 1456, 1464 (S.D.N.Y. 1988) (citing Chae Chan Ping (The Chinese Exclusion Case), 130 U.S. 581, 599-602 (1889); Edye v. Robertson (The Head Money Cases), 112 U.S. 580, 597-99 (1884); Menominee Tribe of Indians v. United States, 391 U.S. 404, 413 (1968); McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 21-22 (1963); Cook v. United States, 288 U.S. 102, 119-20 (1933)).

earlier rule or provision is clear and if the act and the earlier rule or provision cannot be fairly reconciled.[179]

Here, the coextensive character of article 33 and section 243(h) is evident. The Protocol was effective before the Refugee Act of 1980, and Congress attempted to codify article 33 in that Act.[180] Congress in no way attempted to limit the protection of the Protocol.[181] In fact, Congress was attempting to conform the INA to the Protocol.[182] It simply did not anticipate this extraordinary situation in which section 243(h) would need to apply. Nowhere does the INA, or its legislative history, manifest an intent to limit or abrogate article 33.[183] There is, therefore, no reason to deny the Protocol effect. Article 33 and section 243(h) can operate coextensively without difficulty.

V. THE POLITICAL QUESTION DOCTRINE

Because the interdictees have enforceable rights under the Protocol, it follows that the proper role of the court should be to redress any violation of these rights. Nevertheless, the query arises, does the President's action present a non-justiciable political question?

The political question doctrine is particularly relevant in the context of this Note although the *McNary* court did not fully address the issue. In denying certiorari to *Haitian Refugee Center v. Baker*, where the validity of the same interdiction program was at issue, Justice Thomas stated: "[T]his matter must be addressed by the political branches, for our role is limited to questions of law. Because none of the legal issues presented in this petition provides a basis for review, I join the Court's denial of certiorari."[184] Therefore, at least one Justice sees the questions presented in *McNary* as political and non-justiciable.[185]

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179. RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS § 115(1)(a) (1987) (emphasis added).

180. *See supra* part III.C.

181. *See supra* note 68 and accompanying text.

182. *See supra* notes 68-70.

183. *See supra* note 68.

184. 112 S. Ct. 1245, 1246 (1992).

185. Further, the Government argues that this case is in some sense "political." Petition for Writ of Certiorari at 29, *McNary* (No. 92-344) (implying that the case involves a political question); Brief for the Petitioners at 55-57, *McNary* (No. 92-344) (arguing that review under 5 U.S.C. § 702(1) still requires the court to dismiss the action as a non-justici-

A. The Political Question Doctrine Generally

The political question doctrine is rooted in the doctrine of separation of powers.[186] Professor Tribe states that "the political question inquiry turns as much on the court's conception of judicial competence as on the constitutional text."[187] Thus, the analysis must focus on the judiciary's institutional role within our system of government, which is defined to a significant degree by the Constitution.

The Supreme Court, in *Baker v. Carr*,[188] identified the modern criteria for identifying a non-justiciable political question:

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[189]

The *Baker v. Carr* standard incorporates classical, prudential, and functional views of the role of the judiciary.[190] The classical view corresponds with the first factor of the *Baker* test.[191] The prudential considerations correspond with the last three factors.[192] The functional approach corresponds with factors two and three.[193] All three views of the role of the court are potentially implicated in this case. Each view will be considered separately.

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able political question).

186. *See* CHARLES A. WRIGHT, THE LAW OF FEDERAL COURTS § 14 (4th ed. 1983).

187. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-13, at 107 (2d ed. 1988).

188. 369 U.S. 186 (1962).

189. *Id.* at 217.

190. TRIBE, *supra* note 187, § 3-13, at 96.

191. *Id.*

192. *Id.* at n.6.

193. *Id.*

B. Applying the Criteria

1. The Classical View

The classical view is that a court should not interfere when the text of the Constitution commits the action in question to another branch of government. In the context of *McNary*, if the President's actions are to be valid and non-justiciable, they must be based on powers which the Constitution confers to the Executive.

An analysis of the judiciary's proper role within this controversy requires an examination of the relevant constitutional sources of power. The Government argues that adjudication of *McNary* would constitute an impermissible intrusion into the President's foreign affairs authority.[194] This proposition cannot withstand scrutiny under the "classical" view when compared with the court's role of interpreting the treaty as the supreme law of the land.

Professor Tribe argues that although "the President is the sole national 'actor' in foreign affairs, it is not accurate to label the President the sole national policy maker."[195] Although the President has the authority to make treaties, the President can do so only with the advice and consent of the Senate.[196] For example, the United States acceded to the Protocol only with the Senate's approval. Thus, Congress also has a role in making foreign policy.[197]

Moreover, the President's foreign affairs power is quite enigmatic.[198] It derives from several provisions of the Constitution such as the commander in chief power and the power to appoint and receive ambassadors.[199] As the Court notes in *Baker v. Carr*, "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."[200]

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194. Petition for Writ of Certiorari at 29, *McNary* (No. 92-344).

195. TRIBE, *supra* note 187, § 4-4, at 219.

196. U.S. CONST. art. II, § 2, cl. 2. Where the President seeks to unilaterally cancel a treaty, the situation differs. The Constitution does not specifically provide for cancellation of treaties. In Goldwater v. Carter, 444 U.S. 996 (1979), the Court held that since the power to cancel treaties was not provided for in the text of the constitution, the question was non-justiciable.

197. *See generally* LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY AND FOREIGN AFFAIRS 17-43 (1990).

198. TRIBE, *supra* note 187, § 4-4, at 219.

199. *Id.* at 219-20.

200. Baker v. Carr, 369 U.S. 186, 211 (1962).

In contrast, the Constitution unambiguously provides that treaties shall be the supreme law of the land.[201] It also grants the judiciary power for their enforcement.[202] In *Japan Whaling v. American Cetacean Society*,[203] the Court reaffirmed the principle that interpretation of treaties is the province of the judiciary.[204] The Court also recognized the judiciary's power to construe treaties and statutes that have a potential impact on foreign relations:

> [T]he courts have the authority to construe treaties and Executive agreements . . . . [O]ne of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones.[205]

Here, we are not dealing merely with the President's power to act in foreign affairs,[206] but also the President's power to violate the law.[207] The text of the Constitution indicates the court's role here is to apply the law. As Chief Justice Marshall stated in *Marbury v. Madison*, it is the role of the judiciary "to say what the law is."[208]

2. The Functional Approach

The functional approach considers issues such as the ability of a court to gain access to information, and the wider responsibilities of the other branches of government.[209] The functional view corresponds to the second two factors in the *Baker v. Carr* test—"a lack of judicially discoverable and manageable standards" and "an initial policy determination of a kind clearly not for judicial discretion."[210] Here, consideration of both factors indicates that no political question is at stake.

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201. U.S. CONST. art. II, § 2, cl. 2.

202. U.S. CONST. art. III, § 2, cl. 1.

203. 478 U.S. 221 (1986).

204. *Id.* at 230.

205. *Id.*

206. *See generally* Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948).

207. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637-38 (1952) (Jackson, J., concurring) (finding that the President's power is at its "lowest ebb" when acting contrary to law).

208. 5 U.S. (1 Cranch) 137, 177 (1803).

209. TRIBE, *supra* note 187, § 3-13, at 96.

210. *Baker*, 369 U.S. at 217.

Fortunately, the political process has already yielded an answer to the first part of this test. The Protocol provides the necessary standards to evaluate this case. Article 33 specifically prohibits the return of political refugees.[211] Thus, the law at issue in this case implicitly contains the standards necessary for adjudication.

The other prudential factor—initial policy determination—also presents little difficulty. The judiciary is not asked to evaluate the validity of the executive's basic policy toward the Haitian Government. The Court need only enjoin a violation of law.

The caselaw supports the conclusion that protecting the interdictees' rights does not require the courts to resolve a political question. Certainly, where plaintiffs seek to enforce legislative mandates, courts reject the contention that the question is political. In *International Union of Bricklayers and Allied Craftsman v. Meese*,[212] the court considered the justiciability of violations of the law by the executive. The court stated that "[t]he federal courts have jurisdiction over this type of case to assure that the Executive departments abide by the legislatively mandated procedures."[213] When considering President Reagan's interdiction program in *Haitian Refugee Center v. Gracey*,[214] Judge Edwards found no lack of judicially manageable standards. The interdictees were not "challeng[ing] a determination left exclusively to Executive discretion, but a procedure utilized by the Executive pursuant to his constitutional and statutory authority."[215]

Here, the mandate arises from a treaty rather than a statute. However, this distinction does not provide a basis for applying the political question doctrine. Like a statute, a treaty is legislatively approved, but by a different process: an approval by two-thirds of the Senate. It is inconsequential that this approval process differs from the usual legislative procedure for statutes.

More fundamentally, article 33 of the Refugee Convention protects basic human rights, such as the right to a safe haven from

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211. *See supra* text accompanying notes 112-16 (the text of article 33 prohibits the "return" of refugees); *cf.* Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948) (Court could not find judicially manageable standards to evaluate the President's decision to deny a permit to a foreign air carrier pursuant to broad statutory authority).

212. 761 F.2d 798 (D.C. Cir. 1985).

213. *Id.* at 801.

214. 809 F.2d 794, 838 n.116 (D.C. Cir. 1987) (Edwards, J., concurring in part and dissenting in part).

215. *Id.* (citing Proclamation No. 4865, 46 Fed. Reg. 48,107 (1981)).

political persecution manifested by torture and death. Courts are reluctant to find a political question when basic constitutional human rights are at stake. In *Ramirez de Arellano v. Weinberger*, the United States government caused a U.S. citizen's property in Honduras to be "taken" for the purpose of training El Salvadoran soldiers.[216] The court stated that "[t]he Executive's power to conduct foreign relations free from the unwarranted supervision of the Judiciary cannot give the Executive *carte blanch* to trample the most fundamental liberty and property rights [i.e. constitutional rights] of this country's citizenry."[217] Because the plaintiff sought only to vindicate personal rights and not to challenge the basic foreign policy decision to train the soldiers, the court found the case justiciable.[218]

Thus, despite foreign affairs implications, courts are deeply reluctant to find a political question in cases where individuals invoke constitutional rights, especially when the validity of the general policy need not be determined for adjudication.[219] This refusal is founded in the courts' belief that one of its functions is to protect basic constitutional rights.

In functional terms, the human rights protected by the Protocol are indistinguishable from human rights protected by the Constitution. The Protocol supplies the standards necessary for adjudication, and the interdictees' action does not challenge the government's basic foreign policy toward Haiti and its de facto military regime. Therefore, courts should be deeply reluctant to refuse jurisdiction on political question grounds in basic human rights cases which are based on either the Constitution or a treaty.

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216. 745 F.2d 1500 (D.C. Cir. 1984) (en banc), *vacated on other grounds*, 471 U.S. 1113 (1985).

217. *Id.* at 1515.

218. *Id.* at 1512; *see also* Committee of United States Citizens in Nicaragua v. Reagan, 859 F.2d 929 (D.C. Cir. 1988).

219. For example, in Langenegger v. United States, 756 F.2d 1565 (Fed. Cir. 1985), *cert. denied*, 474 U.S. 824 (1985), the court followed the reasoning of *Rameriz*, 745 F.2d 1500, while purportedly distinguishing *Rameriz* in a factually similar situation. *Cf.* Linder v. Calero Portocarrero, 747 F. Supp. 1452 (S.D. Fla. 1990) (refusing jurisdiction on political question grounds in a wrongful death action of a U.S. citizen in Nicaragua because adjudication "would require inquiry into the full scope of [the United States'] *modus operandi* for carrying out warfare in Nicaragua"), *rev'd in part*, 963 F.2d 332 (11th Cir. 1992) (affirming that broad policy challenges to the United States foreign policy toward the military opposition in Nicaragua are non-justiciable).

3. Prudential Concerns

The prudential view allows the judiciary to avoid the merits of a claim when it "would force the Court to compromise an important principle or would undermine the Court's authority."[220] Here, prudential concerns do not advise refusal of jurisdiction.

Three of the factors in *Baker v. Carr* embody prudential concerns: (1) the "impossibility of . . . resolution without expressing [a] lack of the respect due coordinate branches";[221] (2) "an unusual need for unquestioning adherence to a political decision already made";[222] and (3) "embarrassment from multifarious pronouncements."[223]

In *Lowry v. Reagan*[224] the court applied prudential concerns to decline jurisdiction. There, members of Congress sought to challenge President Reagan's alleged violation of the War Powers Resolution[225] when he deployed military forces in the Persian Gulf.[226] The court found that the resolution would potentially result in multifarious pronouncements.[227] Specifically, the court reasoned that resolving the dispute would affect the positioning of U.S. armed forces in the Persian Gulf and therefore would undermine the Executive's statements that the U.S. was neutral in the Iran-Iraq war.[228]

The U.S. interdiction program differs significantly from the political question in *Lowry*. The relationship of the interdiction program to the President's policy on the Haitian governmental crisis is attenuated at best. The Government argues that an uncontrolled influx of Haitians would unduly influence and potentially force the President to take unwarranted action in Haiti.[229] This argument misses the mark because if the court suspended the interdiction program it would not undermine the President's position regarding Haiti. The court's decision would only change the interdiction program with regard to asylum hearings. It would not

220. TRIBE, *supra* note 187, § 3-13, at 96.
221. *Id.* (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)).
222. *Id.* (quoting *Baker*, 369 U.S. at 217).
223. *Id.* (quoting *Baker*, 369 U.S. at 217).
224. 676 F. Supp. 333 (D.D.C. 1987).
225. 50 U.S.C. §§ 1541-1548 (1973).
226. 676 F. Supp. at 336-37.
227. *Id.* at 340.
228. *Id.*
229. Brief for the Petitioners at 56-57, *McNary* (No. 92-344).

affect the U.S. policy toward the Haitian government. The Government insists that adequate asylum procedures are available at the U.S. embassy in Haiti and that all legitimate refugees are granted asylum.[230] Therefore, by the Government's own terms, suspension of the repatriation program without asylum hearings would not result in any additional Haitians immigrating to the United States. Only the manner of these hearings would be affected. The hearings may cause an additional infulx of potential refugees to be interviewed. However, the Executive could mitigate the effect of these interviews, by accelerating the interview process or providing additional temporary detention.

VI. CONCLUSION

The interdictees should not be accorded relief under section 243(h) of the INA. The *McNary* court incorrectly dismissed the presumption against extraterritorial application. Judicial restraint mandates that the court adhere to the presumption and not apply section 243(h) where the congressional intent is not ascertainable. However, the interdictees should be accorded relief under article 33 of the Refugee Convention. The plain language of the Protocol protects the interdictees. Article 33 was intended to be self-executing, and therefore no separation of powers problem exists. Furthermore, Congress did not intend for the Refugee Act of 1980 to limit the scope of article 33—it can operate co-extensively with the INA without intruding upon Congressional authority.

The political question doctrine does not prohibit jurisdiction in this case. First, the text of the Constitution provides for the judiciary to enforce valid laws and treaties. Second, the judiciary functions in its appropriate role when it protects the rights of individuals without passing upon the validity of foreign policy. Finally, the exercise of jurisdiction does not implicate the need for the nation to speak with one voice in the international community.

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230. Brief for Appellees at 2, *McNary* (No. 92-6144).

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The author would like to give special thanks to Professor Stephen J. Schnably whose thoughtful guidance made this Note possible.